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Good morning. My name is Joel M. Gora, and I am a Professor of Law at Brooklyn Law School, where I teach constitutional law. I am also a General Counsel of the New York Civil Liberties Union. It is a privilege to appear before this Committee to discuss the constitutional questions raised by campaign finance laws.

For almost thirty years I have been addressing the ferocious First Amendment problems caused by government controls of political funding. I was privileged to have been one of the ACLU lawyers for the plaintiffs in the landmark Supreme Court case of Buckley v. Valeo, 424 U.S. 1 (1976). There we argued that the key provisions of the Federal Election Campaign Act (FECA) were fundamentally unconstitutional because they cut to the heart of the First Amendment's protections of political freedom. By severely restricting political contributions and expenditures, we contended, the Act limited the ability of individuals and groups, candidates and causes to get their message out to the voters and to the public. The Court, for the most part, agreed, and ruled that the First Amendment, which states that "Congress shall make no law...abridging the freedom of speech; or of the press..."denied Congress the power to do much of what it had done.

But even before working on that landmark case, I helped defend a small group of dissenters who were the very first victims of modern campaign finance "reforms." They were hauled into court by the United States government under the brand new Federal Election Campaign Act in 1972. What was their crime? They had sponsored a full-page advertisement in The New York Times criticizing the incumbent President of the United States, Richard Nixon and calling for his impeachment. Since it was an election year, the government insisted, the ad's criticism of the President might "influence the outcome" of the election, thus demanding that the sponsors be subject to all the heavy-duty provisions of the new law. It almost seemed as if the repressive 18th century Alien & Sedition laws, which made it a crime to criticize the government and which were finally repudiated by the Framers of the First Amendment, had come back in the guise of campaign finance reform. The courts quickly held that it would be "abhorrent" and "intolerable" to subject such citizen criticism of government to campaign finance laws and ruled that such discussions of public issues, even though they criticized incumbent politicians during an election season, were beyond the proper pale of those laws. That's how constitutionally

protected "issue advocacy" was born.

That case was a wake-up call to the severe First Amendment problems posed by campaign finance controls, which we have been addressing ever since. I would like to set forth the central constitutional principles that should guide your consideration of any campaign finance proposal. These are principles which were recognized and established in Buckley, and which have been basically reaffirmed ever since.

Let me briefly describe the Buckley ruling and then discuss the principles upon which it was based.

As is well known, the Supreme Court in Buckley determined that any regulation of political spending is a regulation of political speech, subject to the strictest constitutional scrutiny. Governmental limitations on political expenditures by candidates, campaigns or independents flatly violate the First Amendment. Nothing could justify the government's telling the people how much they can spend to promote their candidacies or causes.

The Court also agreed that, apart from candidates and their campaign committees, the only political funding that could be regulated was that which was used for "express advocacy," i.e., for speech that expressly advocates the election or defeat of an identified candidate. All other speech was deemed, in effect, "issue advocacy," and its funding was rendered totally immune from any government controls. That's how constitutionally protected "soft money" was born. Campaign finance reformers complain that these rules are all "loopholes" for big money and corrupt influence and must be closed. But these aren't loopholes. They are the very essence of the First Amendment: full and open discussion and criticism of official policy and the officials who make it.

Finally, the Court did uphold the Act's limits of $1,000 for contributions made directly to federal candidates, i.e. "hard money," because of the concern that unlimited contributions to candidates might cause corruption or the appearance of corruption. That aspect of Buckley was recently reaffirmed in Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897 (2000), which upheld a Missouri limit of $1,075 on hard money contributions to state-wide candidates. This split-decision aspect of Buckley – limiting contributions to candidates, while permitting unlimited political spending by wealthy candidates, well-heeled campaigns, independent groups, party organizations, issue groups, corporations and unions, and the news media, all of which is necessary to preserve First Amendment rights -- is responsible for many of the campaign finance issues that now confront us.

What are the established constitutional principles that must guide any effort to resolve those issues?

Principle Number 1 - *Limits on campaign funding are limits on political speech and cut to the very heart of the First Amendment*.

Despite the popular misconception that the Buckley decision said that "money equals speech," that was not the Court's reasoning at all. The Court's analysis of why limits on political funding are limits on political speech was straightforward and sensible: "[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the system of government established by our Constitution." For this reason, restrictions on the funding of such discussion and debate are constitutionally intolerable: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached." The Court has reaffirmed the inextricable link between political funding and political speech in numerous decisions ever since.

Principle Number 2 - *Limits on political campaign expenditures by candidates, campaigns, parties and independents violate the First Amendment.*

At the core of Buckley was the principle that government cannot use campaign funding limits to dictate how much political speech candidates or campaigns may have. Government cannot do so to "level the playing field," to "equalize" political participation, or because the government thinks there is "too much" political speech and that most of it is "too negative." Here too the Court's reasoning was clear and convincing: "In the free society ordained by our Constitution, it is not the government but the people -- individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign." By the same token, "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered exchange of ideas for the bringing about of political ans societal changes desired by the people."

Likewise, independent expenditures are also fully protected against limitations. Even in an election where candidates have accepted public funding and agreed to limits on their own campaigns, their independent supporters remain free to speak their mind in support of that candidate. See FEC v. National Conservative PAC, 470 U.S. 480 (1985). This principle also protects certain kinds of ideological corporations which directly support candidates through express advocacy of their election or defeat. See FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). (Business corporations or associations and labor unions, however, cannot use their treasury funds for independent "express advocacy" expenditures.) Likewise, independent hard money expenditures by political parties to support their candidates are protected by the First Amendment and the Buckley principles as well. See Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 614 (1996). None of these principles was called into question by the recent Shrink Missouri Government PAC which did not deal with expenditure limits.

To be sure, there are some who disagree with these well-settled principles, who don't believe in the "unfettered exchange of ideas," who think it is the government, not the people, that should decide how much political speech the people shall be allowed. Most campaign finance

"reformers" fall into that camp. Many academics do as well. Unfortunately, even some Supreme Court Justices take that position. But that view is not and never has been held by a majority of the Supreme Court, and, if the Court remains faithful to the First Amendment, hopefully, it never will be. And that view is not held by a majority of Americans when the constitutional free speech issues posed by campaign finance "reform" are explained to them.

Principle Number 3 - *Issue advocacy is absolutely protected by the First Amendment and wholly beyond **any** campaign finance controls, no matter who the speaker is or how the speech is funded..*

Apart from candidates and their campaigns, campaign finance laws can only be applied to speech which "expressly advocates" the election or defeat of identified federal candidates. The funding of any speech that falls short of such "express advocacy" is wholly immune from regulation. Speech which comments on, criticizes or praises, applauds or condemns the public records and actions of public officials and political candidates -- or speech that discusses whether we need more or less of a tax cut, more or less regulation of tobacco, more or less regulation of abortion, more or less regulation of flag-burning, more or less regulation of campaign finance and identifies the stands of candidates on those issues -- all of those discussions, even though they discuss candidates, and even though they occur during an election year or even an election season are wholly protected by the First Amendment. No limits, no disclosure, no forms, no filings, no controls. Whether the speaker is a political party, an issue organization, a labor union, a corporation, a foundation, a newspaper or an individual, that is all protected "issue advocacy," and the money that funds it is all, in effect, "soft money." Those who advocate government controls on what they call "sham" or "phony" or "so-called" issue ads, and those who advocate outlawing or severely restricting "soft money" should realize how broad their proposals would sweep and how much First Amendment law they would undo.

The Court made that crystal clear in Buckley when it fashioned the express advocacy doctrine, which holds that the FECA can constitutionally regulate only "communications that in express terms advocate the election or defeat of a clearly identified candidate," that include "explicit words of advocacy of election or defeat." The Court was greatly concerned that giving any broader scope to FECA, and allowing it to control the funding of all discussion of policy and issues that even mentioned a public official or political candidate, would improperly stifle vital criticism of government because speakers would fear running afoul of the FECA's prohibitions: "The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." If any reference to a candidate in the context of advocacy of an issue rendered the speech or the speaker subject to campaign finance controls, the consequences for the First Amendment would be intolerable.

In fashioning the express advocacy doctrine, the Court was not naive. It knew that groups could devise "expenditures that skirted the restriction on express advocacy of election or

defeat but nevertheless benefitted the candidate's campaign." But it was willing to take that risk for the First Amendment: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." Based on that reasoning, for almost thirty years the courts have been of almost one voice on this issue, repeatedly condemning any efforts to weaken the "express advocacy" doctrine and subject issue advocacy to controls.

Issue advocacy is freed from government control through a number of other constitutional doctrines as well. First, the constitutional right to engage in unfettered issue advocacy is not limited to individuals or cause organizations. Business corporations can speak publicly and without limit on anything short of express advocacy of a candidate's election. See First National Bank of Boston v. Bellotti, 435 U. S. 765 (1978). (Of course, media corporations can speak publicly and without limitation on any subject, including editorial endorsements of the election or defeat of candidates , i.e."express advocacy," see Mills v. Alabama, 384 U.S.214 (1966).) Contributions to issue advocacy campaigns cannot be limited in any way, either. See Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981). Finally, issue advocacy cannot even be subject to registration and disclosure. See McIntyre v. Ohio Elections Commission, 514 U.S.334 (1995); Buckley v. Valeo, 519 F.2d 821, 843-44 (1975)(holding unconstitutional a portion of the FECA which required reporting and disclosure by issue organizations that publicized any voting record or other information "referring to a candidate"). The rationale for these principles is not just that these various groups have a right to speak, but also that the public has a right to know and a need to hear what they have to say. How else can we have an informed electorate capable of governing its own affairs.

Once again, nothing in the Court's recent Shrink Missouri Government PAC opinion in any way calls any of these principles into question, because that case did not deal with issue advocacy or soft money.

Principle Number 4 - *Contributions made directly to political candidates and their campaigns can be limited as to amount and source.*

This, of course, means hard money. In Buckley, the Court held that campaign contributions to candidates could be subject to legislative limitations of $1,000, because of the concern with corruption and the appearance of corruption. This January, in Shrink Missouri Government PAC, the Court reaffirmed that ruling and once again upheld legislative limits on hard money contributions. The Court majority ignored the problem that by limiting the amount that could be given directly to candidates, but allowing almost all other forms of funding of political speech to be totally unrestrained, the Court had created a situation, as one Justice put it, of "covert speech," i.e. speech which seeks to avoid the contribution limits by taking the form of soft money or issue advocacy, the funding of which cannot be limited.

This dual regime – contributions to candidates or to support "express advocacy" are severely limited while most other political funding and communication is unrestrained, and properly so – has helped create a situation that is unacceptable under the First Amendment.

The Congress, of course, can do something about this situation. The Shrink Missouri decision does not require you to perpetuate the ridiculously low $1,000 contribution limit. You have the authority to raise that limit, and you should do so at least to keep up with inflation, if nothing else. That would make it easier for candidates, especially challengers, to mount a decent campaign. That would be a positive reform.

But beyond that, how do these core principles apply to the legislative proposals you will likely be considering this year?

1. Soft Money

The only political funding that can be subject to control is either contributions given directly to candidates and their campaigns (or partisan expenditures explicitly coordinated with campaigns) or communications that constitute express advocacy. These can be subject to source limitations (no corporations or unions or comparable entities) or amount restraints ($1,000, or $5,000 in the case of PACs). All other funding of political activity and communication is beyond presumptive constitutional control. That would include soft money activities by political parties.

Remember that soft money spending by political parties does not involve direct and express electoral support for federal candidates, even though it may exert some influence on the outcome of elections in the broadest sense of that term. Parties are both advocates for their candidates' electoral success and issue organizations that influence the public debate. Get-out-the-vote drives, voter-registration drives, issue advocacy, policy discussion, grass-roots development and the like are all activities fundamentally protected by the First Amendment and engaged in by a wide variety of individuals and organizations. An issue ad by the ACLU criticizing an incumbent Mayor on police brutality is an example of soft money activity, in the broadest sense of that term, as is an editorial on the same subject in The New York Times. We need more of all such activity during an election season, not less, from political parties and others as well.

The right of individuals and organizations, corporate and otherwise, to support such issue advocacy traces back to the holding in Buckley that only those communications that "expressly advocate" the election or defeat of identified candidates can be subject to control. The Court in the 1996 Colorado Republican case noted the varying uses of soft money by political parties. In the recent Shrink Missouri case, which upheld hard money contribution limits, the Court's opinion was silent on whether soft money could be regulated at all. Although certain individual Justices invited Congress to consider doing so, the case itself had nothing to do with soft money.

To be sure, to the extent soft money funds issue advocacy and political activities by political parties, it becomes something of a hybrid: it supports protected and unregulatable issue speech and activities, but by party organizations often more closely tied to candidates and officeholders. The organizational relationship between political parties and public officials might allow greater regulatory flexibility than would be true with respect to issue advocacy by

other organizations. Thus, for example, disclosure of large soft money contributions to political parties, as is currently required by regulation, might be acceptable, even though it would be impermissible if imposed on non-party issue organizations. But the total ban on soft money contributions to political parties raises serious constitutional difficulties.

Finally, there is also an equal protection problem with a law that bans parties, but no other organizations, from raising or spending soft money. That would mean that any one else - corporations, foundations, media organizations, labor unions, bar associations, wealthy individuals - could use any resources without limit to attack a party and its programs, yet the party would be defenseless to respond except by using limited hard money dollars. A system which lets one side of a debate speak, while silencing the other, violates both the First Amendment and the Equal Protection clause.

2. Issue Advocacy

As I discussed above, the primary purpose of the Court's "express advocacy" doctrine was precisely to protect issue advocacy from campaign finance regulation. That has been settled law for almost 30 years. Yet many legislative proposals would fly in the face of that law by gerrymandering the definition of "express advocacy" in a wholly unprecedented, unconstitutional manner.

Typical proposals would, for example, impose a two-month, 60-day blackout period before any federal election for any broadcast message that in any way "refers to" any federal candidate. Other proposals would restrain "any communication that is broadcast, printed, mailed, or distributed" within the blackout period if it mentioned a federal candidate. Issue organizations could not even write their own members to criticize an incumbent's stand on a legislative or public policy matter during the blackout period. These rules would effectively silence any legislative advocacy group from commenting on incumbents' actions on any legislation pending within two months of an election. Other proposals would control any communication at any time "expressing unambiguous support for or opposition to " any federal candidate. Under such a law, for example, ACLU criticism of the police misconduct policies of a certain New York City mayor who happens to be running for the Senate would effectively be silenced.

By shifting the established boundary line, such radical re-definitions of the constitutional concept of express advocacy would subject to regulation precisely the kind of issue advocacy and issue organizations which the courts have consistently held immune from government regulation. I'm not even sure the ACLU could criticize the **McCain**-Feingold bill by name during this presidential primary election season. That cone of silence would effectively leave the news media as the only organized unrestrained voice on issues and candidates during the critical election season; all other speakers would be forced into the regulatory straitjacket of the FECA. Such a regime raises severe First Amendment problems since it would regulate the very issue advocacy which for more than a quarter of a century has been held categorically immune from government control.

Recent news reports indicate that many groups on the right - anti-abortion groups, business and trade associations, the Christian Coalition, the tobacco industry - will be raising election year issues that may be favorable to Governor Bush. Groups on the left - labor unions, trial lawyers, environmental groups, trial lawyers, civil rights organizations - will be raising issues that may be favorable to Vice-President Gore. We should not be condemning all this issue advocacy and scrambling to find ways to plug the First Amendment "loopholes" that permits it. Instead, we should be applauding all of this wide-open, robust and uninhibited discussion and debate and realizing that it is exactly what the framers of the First Amendment hoped we would do.

For more than 25 years, the courts have spoken with almost one voice in holding that campaign finance controls cannot regulate issue advocacy and can only regulate express advocacy, defined in terms of the explicit content of the communication. Any bill that does otherwise is fatally flawed and unconstitutional.

3. Free Speech

If we should have learned anything about campaign finance in the last 25 years, it is that limits on political funding simply don't work - constitutionally or politically. Going down the path of more limits is a dead end.

There are three <u>real</u> reforms that might work to address the campaign finance dilemma.

First, raise the hard money contribution limits. That is wholly within your power and would greatly ease the fund-raising burdens particularly felt by less well-established candidates. Just raising the limit to $3,000 to keep up with 25 years of inflation would be useful.

Second, provide for instant and effective disclosure of large contributions to candidates and campaigns, so that the people can decide which persons and groups have too much influence because of their financial support. But raise the threshold for disclosure to at least $500, so that you will protect the political anonymity and privacy of small donors.

Third, begin serious consideration of various kinds of serious public support for political campaigns. This doesn't necessarily have to be an elaborate program of comprehensive direct federal grants to candidates, with all kinds of strings and conditions attached. Rather, it could include a mix of approaches: matching funds to amplify small contributions, tax deductions or tax credits to encourage modest contributions, and benefits like free mailing costs to all ballot-qualified candidates. Programs like these would provide ample public benefits to support candidacies without imposing burdensome public controls over those candidacies.

These are the kinds of campaign finance reforms that further, rather than undermine, the principles of the First Amendment.

Thank you.